IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GARY S. MOORE, Petitioner.	2 CA-CR 2006-0309-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-58986

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

DiCampli & Elsberry, LLC
By Anne Elsberry
Tucson
Attorneys for Petitioner

B R A M M E R, Judge.

¶1 Following a jury trial, petitioner Gary Moore was convicted of two counts each of armed robbery and aggravated assault, all dangerous offenses. The trial court imposed a combination of consecutive and concurrent, aggravated sentences totaling fifty-seven years. We affirmed Moore's convictions and sentences on appeal. *State v. Moore*, No. 2 CA-CR 00-0099 (memorandum decision filed Nov. 30, 2000). We denied relief on Moore's petition for review of the trial court's denial of post-conviction relief on his first petition for post-

conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. *State v. Moore*, No. 2 CA-CR 2003-0197-PR (decision order filed July 28, 2004). This petition for review followed the trial court's dismissal of Moore's second petition for post-conviction relief and the denial of his motion for entry of a nil dicit judgment. We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find no abuse here.

¶2 Moore first claims that he is entitled to be resentenced under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), because a jury did not determine the aggravating circumstances beyond a reasonable doubt. Because the trial court denied post-conviction relief in a minute entry order that clearly identified Moore's arguments on this issue and correctly ruled on them in a manner that will allow this court and any future court to understand its resolution, we need not revisit those arguments. *State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993).

¶3 Moore next claims trial counsel was ineffective because he either did not explain, or Moore did not understand, that he might receive consecutive sentences far in excess of the maximum sentence set forth in the plea offer he ultimately rejected, apparently arguing that he is entitled to relief based on *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000). The trial court correctly found Moore's claim precluded, explaining that Moore had previously raised, without success in either the trial court or in the court of appeals, this very claim. *See* Ariz. R. Crim. P. 32.2(a)(2).

¶4 Moore also contends that the attorneys who represented him on direct appeal and in his first Rule 32 proceeding should have filed supplemental pleadings to raise a claim based on *Blakely*. Mistakenly relying on the belief that his first post-conviction petition, which followed his direct appeal and was pending when *Blakely* was decided was the "functional equivalent of a direct appeal," Moore contends that *Blakely* applies to him and that he should be resentenced as a result. Moore is not a pleading defendant. As such, he was entitled to and received a direct appeal, which became final when this court issued its mandate on appeal in 2001, well before *Blakely* was decided in 2004. *See State v. Febles*, 210 Ariz. 589, ¶ 17, 115 P.3d 629, 632 (App. 2005) (*Blakely* does not apply retroactively to defendants whose convictions were final when *Blakely* was decided). There simply is no "functional equivalent" of a direct appeal for a nonpleading defendant who has exercised that very right. Because *Blakely* does not apply to Moore, as the trial court correctly found, *see Whipple*, neither appellate nor Rule 32 counsel were ineffective for having failed to raise a claim based on *Blakely*, *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). Moreover, having raised a claim of ineffective assistance of trial counsel in his first Rule 32 petition, Moore has waived the opportunity to raise any other existing claims of ineffective assistance of counsel in a subsequent post-conviction proceeding. *See* Ariz. R. Crim. P. 32.2(a)(3). Nor is this a claim of "sufficient constitutional magnitude" to avoid preclusion. *See Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002). Therefore, Moore's claim that appellate counsel was ineffective is in any event precluded.

¶5 Finally, Moore contends the trial court erred by denying his motion for judgment nil dicit, which he filed after the state filed its untimely response to his Rule 32 petition without having requested an extension. He also contends the court erred by denying his related motion to strike the state's response. It is undisputed that the state's response was untimely. *See* Ariz. R. Crim. P. 32.6. In its ruling denying Moore's motion for a nil dicit judgment, which the court entered on the same day it dismissed Moore's Rule 32 petition, the court "admonished" the state for failing to file a timely response, but nonetheless found "no authority to support entry of a Nil Dicit Judg[]ment on behalf of a criminal defendant." Even if the court had stricken the state's response, as Moore had urged it to do, it is clear that it would not have granted post-conviction relief in any event. Moore simply did not raise any colorable claims upon which post-conviction relief could have been granted. Accordingly, the court did not abuse its discretion in ruling as it did.

¶6 Although we grant the petition for review, we deny relief.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge